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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 371

[illegible] & Olsen Corporation,
Petitioner,
vs.
[illegible] Steamship Company, a corporation, Matson [illegible] Company, et al.,
Respondents.

Brief of Luckenbach Steamship Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[illegible]

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OLIVER J. OLSON & CO., a corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation, MARINE LEOPARD CARGO, et al.,
Respondents.

Brief of Luckenbach Steamship Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

I.

STATEMENT

On May 15, 1956, the *Marine Leopard*, proceeding south at 17 knots along the California coast, collided near Point Sur with the northbound *Howard Olson*, which was traveling at 8 knots. The night was fine and clear and the lights of each ship had been visible to the other for half an hour. The *Marine Leopard*, having observed both sidelights of the *Howard Olson*, altered course to the right nonconformity with the International Rules for Navigation at Sea relating

to meeting vessels (33 U.S.C. § 146b(a)). The *Howard Olson*, in addition to other errors, altered course to the left and the vessels collided at 0218 or 0219. The track of the *Marine Leopard* was recorded on her course recorder. The interpretation of the course recorder tape was a matter in dispute. The track of the *Howard Olson* is in doubt, since the testimony of her own witnesses on this point is in conflict (see Appendix).

II.

QUESTIONS PRESENTED

This case involves only a narrow issue of fact concerning the tracks of the vessels as they approached the collision. It does not present any important question of law justifying review by this court. Petitioner is a disappointed litigant seeking review of a factual issue of concern to no one but the parties to this particular case. As stated in *Grower Manufacturing Co. v. Leader Co.*, 336 U.S. 271, 275; *Jost v. Chambers*, 312 U.S. 383, 385, the United States Supreme Court is not "a court for correction of errors in fact finding".

III.

ARGUMENT

A. The Basis for the Petition.

Petitioner does not quarrel with the fact that the officers and crew of the *Marine Leopard* gave testimony in sharp conflict with that of the officers and crew of the *Howard Olson*. Further, petitioner concedes, as it must, the function of the district judge in evaluating the credibility of these witnesses.

The petition is based on two claims:

(1) That the *Marine Leopard* version of the collision was impossible;

(2) That uncontradicted evidence from independent sources corroborated the *Howard Olsen*'s version.

On the basis of these two claims petitioner asserts that the "overwhelming preponderance" (Petition, p. 12) of the evidence favored its version. Petitioner further asserts that the Court of Appeals ignored this overwhelming preponderance of evidence and erroneously sustained the District Court's decision merely because the *Howard Olsen*'s version was not "clothed with mathematical certainty" (Petition, p. 13). Petitioner's claims and assertions do not bear comparison with the record.

B. The "Physical Impossibility" of the Marine Leopard's Claims.

Without attempting to explain why, petitioner states that this collision could not have occurred had the vessels been on meeting courses (Petition, p. 8). This is not true. A detailed diagram was prepared by a naval architect who was fully familiar with the speeds, drafts and maneuvering characteristics of each vessel and was introduced into evidence as Luckenbach's Exhibit No. 20 (Record p. 924). This diagram demonstrates clearly that the collision not only could have happened as Luckenbach claims, but probably did.

C. The "Undisputed" Evidence Corroborating the Howard Olsen's Version.

Petitioner attached to its petition a chart, purportedly showing "the tracks of the two vessels, prepared from uncontradicted evidence". This same chart was urged upon the trial court and the Court of Appeals. It is based on portions of testimony selected out of context and a distorted interpretation of the *Marine Leopard*'s course to

corder.[1] This is most easily demonstrated by the following chart, which illustrates the various tracks of the *Howard Olson* which result from a diagramatic presentation of the differing testimony of Olson's various witnesses. A glance at this chart shows that, even disregarding Luckenbach's evidence, there is no certainty whatever as to the track of the *Howard Olson* as she approached the collision.

Luckenbach has never conceded that the *Howard Olson* was on base course 320° true and has never conceded the accuracy of Kittinger's 0204 positioning of the *Howard Olson*, which was not recorded but was merely a matter of memory (or his 0155 position, or his collision position, for that matter). However, it is interesting to note that Kittinger's *entire* testimony confirms a meeting situation and contradicts Olson's version of the collision.[2]

D. The Court of Appeals Reaction to the Evidence Relied upon by Petitioner.

There is no valid basis or merit in petitioner's claim that the Luckenbach version of this collision was physically impossible.[3] Nor is there any basis for labeling the testimony

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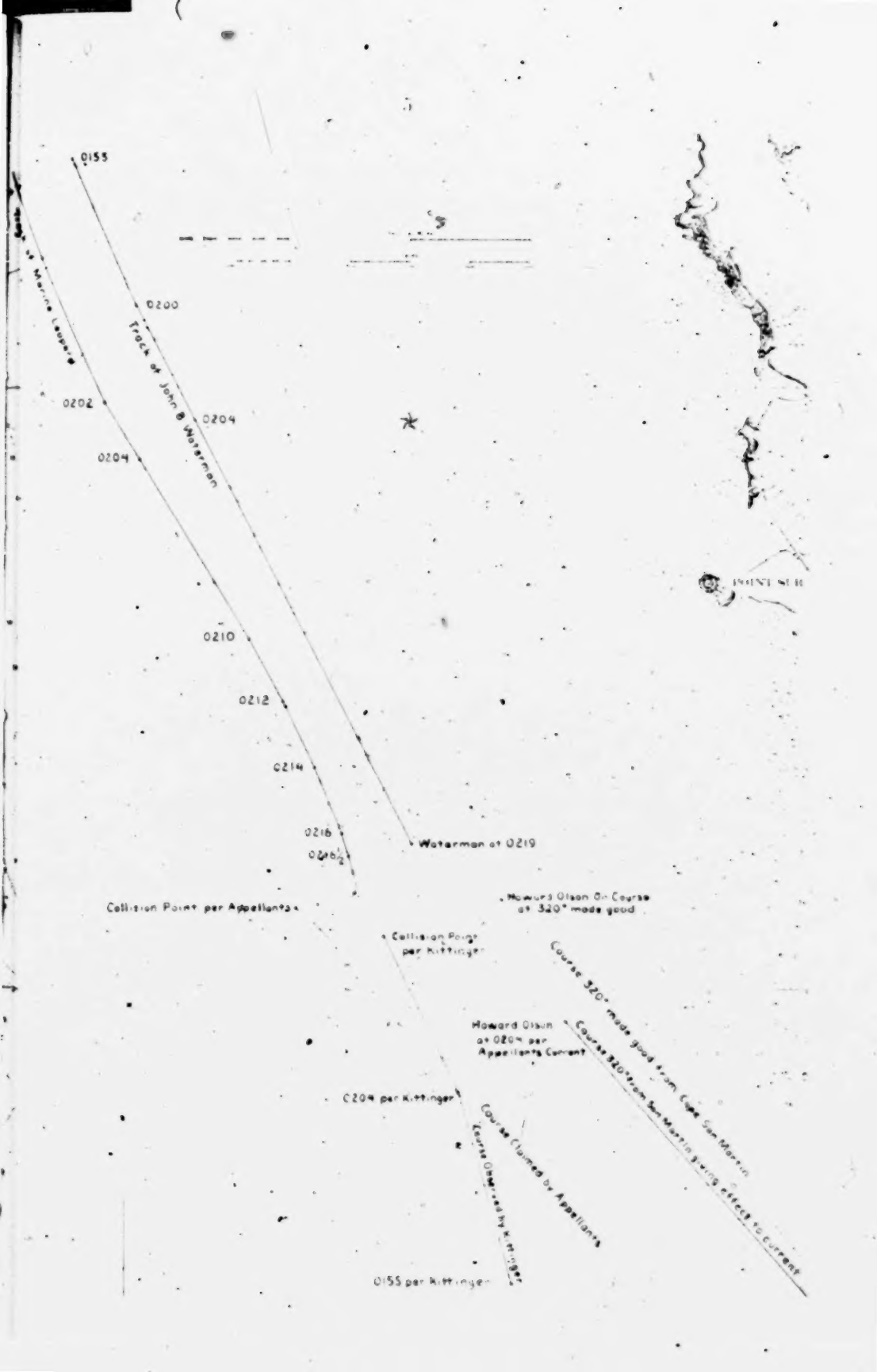
1. Petitioner concedes that respondents "interpret the course recorder slightly differently." This is an admission that there was a dispute of fact on this subject.

2. Kittinger observed the range and bearing of the *Howard Olson* at three times: 0155, 0204 and at collision (see Appendix). A line connecting these three points is labeled "course observed by Kittinger" on the accompanying chart.

3. For instance, if on the accompanying chart the "course claimed by appellants" is moved to the east approximately one half mile, so that the "collision point per appellants" coincides with the terminal point of collision shown on the "track of the *Marine Leopard*", a perfectly possible and plausible picture of the collision on meeting courses results.

Petitioner has also stated:

"* * * if the *Olson* at 0210 were * * * showing both red and


0155
0200
Track of John B Waterman
0202
0204
0204
0210
0212
0214
0216
0216½
Waterman at 0219
Howard Olsen On Course at 320° made good
Collision Point per Appellants
Collision Point per Kittinger
Howard Olsen at 0204 per Appellants Current
Course 320° made good from Cape San Martin
Course 320° from San Martin giving effect to Current
0209 per Kittinger
Course Claimed by Appellants
Course Observed by Kittinger
0155 per Kittinger

of the *Waterman* mate, Kittinger, as uncontradicted or undisputed. Kittinger's testimony was vigorously disputed and shown to be unreliable. So, also, did Luckenbach dispute and successfully disprove petitioner's interpretation of the *Marine Leopard's* course recorder. Thus, not only was there no "overwhelming preponderance" of evidence in favor of petitioner's claims, the balance was in favor of Luckenbach's version of the collision.[4]

The Court of Appeals opinion listed the five items of evidence upon which Olson's version of the collision was based. As to these five items the Court of Appeals said:

> "These items of evidence unquestionably have great probative value. However, the issue here is not what weight the trial court could have given these items of evidence, but whether the court was required to give them controlling effect over the other evidence."

The court then went on to list only some of the reasons why each of these five items of evidence was subject to

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green to the *Leopard*, and thereafter only red * * * a collision would have been physically impossible."

The simplest refutation of this statement is also the most obvious explanation of the confusion and inconsistency in Zinkiewicz's testimony. If instead of maintaining an undeviating course of 320° until moments before the collision (there is no finding of fact that she did) the *Howard Olson* altered her course in indecision, she would have shown all combinations of lights at different times. Further, even if she were on course 320°, imperfect helmsmanship, yawing and inevitable imperfections in sidelight screening would cause both her lights to be disclosed. See Farwell, The Rules of the Nautical Road, 1941 Ed. & 2d Ed., p. 144, as to sidelight screening.

4. The petition repeatedly refers to the "admitted" faults of the *Marine Leopard*. At no time has respondent admitted the faults of the *Marine Leopard*. Such fault was initially denied in the pleadings and vigorously denied and contested in the trial court. The fact that the District Court's finding fault was not appealed does not amount to an admission of fault. *The Mohawk*, 242 F. 845 (2nd Cir. 1917). See also *Federal v. South American Shipping Corp.*, 159 F. 2d 795, 797 (2nd Cir. 1947).

disbelief. The court concluded its discussion of the weaknesses embodied in this evidence with the comment:

> "* * * the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility."

While the Court of Appeals may have been guilty of understating the contradictory character and unreliable nature of Olson's evidence it was certainly not guilty of applying an improper standard of review.

E. The Standard of Review Employed by the Court of Appeals.

The standard of review applicable to this case was clearly set forth in *McAllister v. U. S.*, 348 U.S. 19 (1954), where this court stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. * * *. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed' * * *." (Citing *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) now relied upon by petitioner.)

The Court of Appeals expressly referred to and adopted the standard set forth in *McAllister v. U. S.*, *supra*. Having thus established its standard of review, the Court of Appeals reviewed the five items of evidence which Olson contended required reversal of the trial court's findings and concluded that:

> "* * * enough uncertainty is connected with these five items so that it may not fairly be said * * * that such items render extremely doubtful the credibility of the oral testimony relied upon by the trial court. There

fore, the independent evidence upon which the Olson Company relies does not, in our opinion, warrant disregard of the trial court's appraisal of witness credibility."

Any reasonable person reading the Court of Appeals' criticism of the evidence relied upon by Olson can be left with no doubt that the Court of Appeals concluded the trial court's findings were not clearly erroneous and certainly had no conviction that a mistake had been committed.

5 The Court of Appeals did not find it necessary to consider the further fault of the *Howard-Olson* in failing to take timely action to avoid the collision. This fault was clear and flagrant. The trial court so held (see Findings IX and XI, Record, pp. 111 and 129). By testimony of her own witnesses, the *Olson* failed to take any action to avoid the collision until one to one and one half minutes before the vessels collided (Record, p. 112). She was proceeding full speed in clear weather and had the *Luckenbach* in sight continuously for over 16 miles (Record, p. 112).

IV.

CONCLUSION

The Court of Appeals expressly adopted the standard of review set forth in *McAllister v. U.S.*, *supra*. The Court of Appeals having adopted this standard, applied it, and found that the trial court's findings were not clearly erroneous and, after reviewing the evidence relied upon by Olson for reversal, left no doubt that it was not of the conviction that a mistake had been committed.

The correct standard of review was properly applied. Accordingly, the petition should be denied.

Respectfully submitted,

ALLAN E. CHARLES
WILLARD G. GILSON
311 California Street
San Francisco 4, California

Attorneys for Respondent Lackenbach Steamship Company

LILLICK, GEARY, WILLAT, ADAMS & CHARLES
311 California Street
San Francisco 4, California

BURLINGHAM, HUPPER & KENNEDY
26 Broadway
New York, N.Y.

Of Counsel

(Appendix Follows)

Appendix

The watch officer of a nearby vessel, Kenneth Kittinger, testified on behalf of the Olson Company. Kittinger's observations of the *Howard Olson* were made at three different times. At 0155, after the *Howard Olson* had been in view for sometime, he sighted down the starboard side of his mast (Record, p. 1092) and calculated that the *Howard Olson* was bearing 2° off his starboard bow at a distance of ten miles (Record, p. 1071). (The distance he obtained from radar.) At 0204 Kittinger glanced at his radarscope and estimated that the *Howard Olson* was bearing 5° off his starboard bow at a distance of six miles (Record, p. 980). He did not plot this radar observation or write it down. It is simply a matter of memory. Later, at the moment of the collision (0219 *Watermaa* time), he observed that the *Howard Olson* and the *Marine Leopard* were bearing 198° at a distance of three-quarters to one mile away (Record, pp. 1021, 1022).

These observations are inconsistent with appellant's claim that the *Howard Olson* was on course 320° true. For this reason appellant conveniently ignores the other two of Kittinger's observations and selects as "absolutely accurate" and "uncontradicted" the 0204 observation because it is the only one which lends any support to the *Olson*'s claim.

However, the 0204 observation is inconsistent with the *Olson*'s own testimony. The *Howard Olson*'s watch officer, Zinkiewicz, testified that the *Howard Olson* proceeded north on course 320° true from a 10 p.m. position three miles abeam Cape San Martin (Record, p. 174). Such a course would take the *Howard Olson* well inshore of the point where Kittinger placed her at 0204 — so far inshore, in fact,

that the Olson would have to approach the *Marine Leopard* port-to-port. Further, the *Howard Olson*'s master located the point of collision far inshore of where it would have had to occur if Kittinger's estimate were accurate (Record, p. 528).